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No. 07-1012

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SUPREME COURT, U.S.

In The Supreme Court of the United States

CHARLES ALFORD,

Petitioner,

v.

CUYLER LARUE WINDHAM, JR., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit correctly hold that, given the tense, uncertain, and rapidly evolving situation confronting Respondent Cuyler LaRue Windham, Jr. ("Captain Windham"), and under the threatening and volatile circumstances he faced, could a reasonable law enforcement officer have believed that Petitioner posed an immediate threat of serious physical harm?

PARTIES TO THE PROCEEDINGS

Petitioner is Charles Alford.

Respondents are Cuyler Larue Windham, Jr. and Sheriff Earl L. Butler

INTRODUCTION

The Fourth Circuit correctly applied *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed 2d 443 (1989), to the tense, uncertain, rapidly, evolving, threatening and volatile situation that faced the Cumberland County Sheriff's Office ("CCSO'S") Special Response Team ("SRT").

After fierce resistance and being denied entry, despite a valid search warrant, through the front door of the mobile home where Petitioner was present with his drug-dealing relatives, the SRT forced entry through the rear door. During the course of entry Captain Windham shot Petitioner, who was within arm's reach and was non-compliant with shouted instructions to get down. Petitioner disputed Captain Windham's contention that he shot Petitioner out of a fear that his gun might be turned against him, when Petitioner's niece, Lakina Alford ("Lakina"), jumped on Captain Windham's back and he felt his H&K semiautomatic machine pistol being jostled. As the Fourth Circuit decision noted,

> [Petitioner] argues that these discrepancies generate a credibility contest that a jury must decide in order to determine Windham's true motivation for shooting him. This argument misperceives the qualified immunity test. The test is objective, meaning that Windham's subjective motivation is irrelevant. The task that the court must accomplish at the summary judgment

> stage is to reconstruct the record resolving all disputes in [Petitioner's] favor . . . [T]he Court must then ask whether a reasonable officer in Windham's position could have believed that his gun was threatened. The Court does not inquire whether Windham himself believed that his gun was threatened. Instead, the focus is on a hypothetical reasonable officer facing the situation (reconstructed in [Petitioner's] favor) that Windham faced.

Alford v. Cumberland County, No. 06-1569 (October 15, 2007), slip op. at 12-13.

This case is a perfectly unexceptional application of this Court's decision in *Graham*. The Fourth Circuit focused on uncontested facts or facts admitted by Petitioner in holding that

> given sufficient time to reflect, a reasonable officer may well have stayed his hand. The volatile, threatening situation facing Windham, however, did not afford time for reflection. A reasonable police officer could have believed that if he paused for even an instant, he risked losing his last chance to defend himself. . . .
>
> . . . .

> [A] reasonable officer, forced to make a quick decision, could have concluded that [Petitioner] posed an immediate threat of serious physical harm. (citations omitted).

Slip op. at 14, 18.

STATEMENT OF THE CASE

In early 2003, after months of observation, surveillance, and accumulation of evidence of extensive illegal narcotics transactions at 312 Ministry Lane, a mobile home and residence in rural Cumberland County, North Carolina, a federal/state/local law enforcement drug task force identified Petitioner's nephew, Garry Alford ("Garry"), as a major trafficker of cocaine and crack cocaine, together with other conspirators, including Garry's mother and sister. Participants in the task force included the United States Drug Enforcement Administration ("DEA"), the North Carolina State Bureau of Investigation ("SBI"), and the CCSO. S.A. 1.

Following this surveillance and a series of controlled buys[1] of drugs from Garry by a confidential

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1 The Fourth Circuit's description/definition of a controlled buy can be found in *United States v. Clyburn*, 24

informant, DEA Special Agent John Wilson directed that a federal search warrant be obtained and served at 312 Ministry Lane and at Garry's residence on Dominion Drive. Janet Alford ("Janet"), who is Garry's mother and Petitioner's sister, and Lakina, lived at 312 Ministry Lane. S.A. 2-3.

The investigation determined that Garry conducted much of his drug trafficking business from this Ministry Drive location. Garry also maintained a residence at Dominion Drive, where he lived with his girlfriend, Tanisha Whitted, and her two children, Makayla and Xavier. S.A. 4, 6. However, after an armed robbery at Dominion Drive in January 2003, Garry, Tanisha, Makayla, and Xavier stayed mostly at Ministry Lane. S.A. 5.

The DEA set the date for the drug raid as February 27, 2003, and required the assistance of the SRT to serve the federal search warrant at Ministry Lane and Dominion Drive and secure the occupants. The drug raid occurred at about 8:00 p.m. on February 27, 2003, following a final controlled buy of crack cocaine by the confidential informant at Ministry Lane. S.A. 8, 1482. Prior to the raid, the SRT conducted close surveillance and monitoring of the

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F.3d 613, 617 (4th Cir.), *cert. denied*, 513 U.S. 907, 115 S. Ct. 274, 130 L. Ed. 2d 192 (1994).

site, reviewed criminal incident reports for the site and the subjects, ran criminal history checks, prepared operations plans, participated in an overall briefing in which all members of the task force joined, and then held a tactical briefing of the SRT itself. S.A. 9-82.

At the direction of DEA Special Agent John Wilson, CCSO Captain Smith prepared an operations plan for Agent Wilson's approval. S.A. 83. Background intelligence revealed that a number of the subjects had prior felony convictions for drug trafficking and other crimes, a confidential informant had provided information about a series of controlled buys of quantities of cocaine, and neighbors (including a CCSO deputy) had complained of criminal and "drug house" activity at 312 Ministry Lane. In addition, the CCSO's database included a report of a weapon discharged at the Ministry Lane mobile home in the recent past. S.A. 84-86. The officers were also aware from the confidential informant that children might be present. S.A. 87.

The SRT prepared its own tactical operation plan. S.A. 87. That plan was thoroughly reviewed, and it formed the basis for the briefing conducted prior to the raid. Among the criminal history intelligence that the task force had was that Garry had previously been convicted of state felony drug trafficking charges

and had served prison time. S.A. 88-89. Janet had also previously been convicted of state felony drug trafficking charges. S.A. 90-93. Lakina also had previously been convicted of state felony drug charges. S.A. 94-95. Task force members were also aware that Petitioner's father, Willie Alford, Sr., was another frequent visitor who had a criminal history of misdemeanor assault as well as assault on a female. S.A. 96-97.

Captain Windham was the SRT supervisor, but at the time of the raid, the officer in command at Ministry Lane was then-Sergeant (now Lieutenant) Charles Parker. S.A. 98. Because of the limited size of the SRT and the dual, simultaneous raids at Ministry Lane and Dominion Drive, Captain Windham was included on the Ministry Lane team to provide necessary manpower. S.A. 59.

At the time of the raid, Captain Windham had 17 years experience with the CCSO. S.A. 100. He had been on the SRT since its inception in 1995, although he had worked with the predecessor special operations unit under the prior sheriff and had supervised the SRT since 2001. S.A. 101. Captain Windham had received extensive training on the SRT from the FBI as well as from the North Carolina Justice Academy. He was also a graduate of the FBI National Academy.

Similarly, all members of the SRT had received extensive and regular training. S.A. 253-1448.

Captain Windham had never been the subject of any complaints of excessive force while engaged in SRT duties. No meritorious or sustainable excessive force complaints against SRT members have ever been asserted.

Petitioner and his wife, Bobby, lived outside of Atlanta, Georgia. S.A. 103. At the time of the drug raid, Petitioner was essentially an unemployed owner/operator long-distance truck driver. Petitioner stayed in Cumberland County without work most of January and February 2003. S.A. 104-05. Bobby joined Petitioner in Cumberland County in mid-February at the time of the funeral of an aunt of Petitioner, and was at Dominion Drive at the time of the drug raid. S.A. 106. Although Petitioner and Bobby based themselves at Dominion Drive during this period, either or both frequented the Ministry Lane residence, spending days and evenings at Ministry Lane visiting with family members. S.A. 107-08.

Petitioner had not obtained any work in January or February 2003. He was having difficulty paying his bills. S.A. 109-14. He was paying on two tractor trucks. Petitioner routinely fell behind on his

truck or house payments. S.A. 115-16. In early 2003 Garry loaned Petitioner $6,000, presumably to tide Petitioner over until he received other income. Petitioner was aware that Garry had been convicted and served prison time for dealing drugs and that Garry had no visible means of support. S.A. 117-18.

The confidential informant verified that on several occasions when she went to Ministry Lane to buy drugs, Petitioner was present and she talked with him. S.A. 1482. Indeed, just before the raid, Petitioner sat at a computer eight feet away from the informant while she finalized the purchase of 2 ounces of crack cocaine from Garry. Garry was "cooking" the crack on the stove just a few feet across the counter top that separated the kitchen from where Petitioner sat at the computer. S.A. 1482. Petitioner claims he was unaware that Garry was selling crack to the confidential informant a few feet away.

At the time the drug raid began, nine people were in the mobile home at Ministry Lane.[2] S.A. 119-31. Garry was found in Janet's bedroom at the end of the mobile home closest to Ministry Lane. S.A. 132. Lakina was in the kitchen area. S.A. 133. Willie

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2 A schematic diagram of the mobile home prepared by a registered engineer appears at S.A. 157.

Alford Sr. was in the vicinity of the living room. S.A. 135. Makayla and Xavier were seated on a sofa against the back wall of the living room. S.A. 134. An elderly, feeble uncle of Petitioner, Johnny Alford, was in the first bedroom on the hall leading from the front door away from the direction of Ministry Lane. S.A. 136. Tanisha Whitted and a visitor were in the bedroom at the end of the mobile home farthest from Ministry Lane. S.A. 137. Petitioner states he was playing solitaire (S.A. 138-39) on the computer located approximately eight feet from the front door (S.A. 140) and adjacent to the partial counter that separated the living room from the kitchen. S.A. 141-42.

The SRT approached the end of the mobile home furthest away from Ministry Lane. S.A. 143-47, 148-50. Team members testified that as they approached along the front of the mobile home several of them banged loudly on the mobile home and announced, "Sheriff's Office, search warrant." Occupants of the mobile home heard a loud banging but none acknowledge hearing "Sheriff's Office, search warrant." S.A. 158, 159-60. Petitioner denies hearing any banging.

At the front door, Deputy Leggette, a 260 to 280 pound former Fayetteville State University football player, slammed a metal battering ram into the door

several times. S.A. 161-64. Several SRT members saw the door open six to eight inches and then slam closed about three times. S.A. 161-64. One member recalls seeing the face of a black male briefly through the partially-opened door. S.A. 165. Petitioner, sitting about eight feet from this door, states he does not remember either hearing the battering ram or seeing the partial breach of the door. S.A. 172.

Having been blocked from entering through the front door, the SRT leader called "alternate breach". S.A. 150, 169. The SRT members reversed course, ran around the end of the mobile home (S.A. 143), and began to re-assemble on the back porch to enter through the rear door. S.A. 175.

As SRT members were coming to the back porch, Sgt. Parker kicked in the back door. S.A. 176. Deputy Meade rolled a distraction device, commonly called a "flash-bang," into the mobile home. S.A. 177-78, 179. Unknown to the officers, the back door opened into a laundry vestibule with a washing machine and dryer located immediately inside and to the right. Another door opened into the kitchen from the laundry vestibule. The distraction device deployed at the second door, discharging more of its effect in the laundry vestibule than in the kitchen. S.A. 179-80, 183.

Sgt. Parker then entered, proceeding through the laundry vestibule, shouting repeatedly for persons to get down on the floor. Sgt. Parker turned left into the kitchen, and continued towards the living room. In the kitchen/living room area, he encountered a thin older black male standing and non-compliant. Sgt. Parker attempted to force the man down to the floor; with Sgt. Parker's momentum, he testified that they went down on the living room floor near the hallway leading to the two bedrooms at the farthest end of the mobile home from Ministry Lane. S.A. 181-82.

Following Sgt. Parker, Deputy Meade entered, shouting repeatedly for persons to get down on the floor. Deputy Meade went through the laundry vestibule into the kitchen, and then turned right into Janet's bedroom. There he encountered and secured Garry. S.A. 183-85.

Captain Windham followed Deputy Meade through the vestibule, into the kitchen and turned left. Like the other officers he shouted repeatedly, and loudly enough so that even the next door neighbors heard them, for everyone to get down on the floor. S.A. 186, Appx. to Mot. for Summ. Judgment at 4807.

Each of the officers carried a Hock & Kessler MP5 semiautomatic suppressor-fitted machine pistol.

Captain Windham held his weapon in his right hand with a shoulder strap over his right shoulder. S.A. 187-88. Heading into the kitchen, Captain Windham saw a large black female (Lakina), who refused to comply with the directive to "Get down!", and who stood in the kitchen generally in front of the sink. Captain Windham proceeded to her and went "hands on," seeking to put her to the floor to secure her. S.A. 186-93.

As Captain Windham attempted to put this large female (Lakina) on the floor, his attention was drawn toward the direction of the living room by a large black male. The large black male approaching Captain Windham was Petitioner, and, *according to Petitioner himself,* and as confirmed by forensic examination, was leaning forward and with arms outstretched S.A. 214, 252N, 252Q, 252S-252W. Captain Windham turned, stepped toward Petitioner, and attempted to put a hand on Petitioner's head to try to force him down to the floor. Petitioner did not go down. As Petitioner moved towards Captain Windham from the front and with Lakina either behind or to the side of Captain Windham, he felt jostling and tussling of his gun and right forearm, which he perceived to be an effort to grab his gun. Fearing that his gun was about to be taken from him, and knowing that many officers are shot with their own weapons, Captain

Windham depressed the trigger once and shot a three round burst. Petitioner went down backwards, shot. S.A. 193, 203-10.

According to uncontested evidence from crime scene reconstruction expert Ross Gardner, Captain Windham's first shot hit Petitioner in the arm and chest, traveling from Petitioner's right to his left at an oblique angle to his body while the weapon was in close proximity. S.A. 213. Petitioner was bent slightly at the waist or chest towards the muzzle. S.A. 214. The uncontested forensic evidence further shows the following:

- *At the time Petitioner sustained the arm and left chest wound, his right hand was either touching or in very close proximity to the muzzle of Captain Windham's weapon.* S.A. 213, 252FF-252LL, 252NN-252RR, 252UU.

- Petitioner's body was turned with his right side facing the weapon. S.A. 215

- The second bullet was shot in an almost level trajectory, but slightly downward, from a height of about 34 inches from the floor level, establishing that Captain Windham was in a "crouched" position with knees substantially

bent when the first bullet was fired. S.A. 211-16. The trajectory is consistent with Captain Windham having a heavy female such as Lakina, who weighs over 200 pounds, on his back when he fired.

- The third bullet was shot from a muzzle position 14 inches different from that of the first shot, indicating that the muzzle underwent a considerable lateral motion between the discharge of bullets two and three. *A fortiori*, Captain Windham himself was in a similar transition, moving left to right and rising abruptly, as if he had shucked off a heavy weight from his back. S.A. 211-16.

When the suspects were finally brought under control, DEA officers conducted their search pursuant to the federal search warrant. They found residue from crack cocaine manufacturing in the same kitchen area where the informant advised officers that Garry had cooked crack cocaine just before the raid began – the same kitchen area where Captain Windham first encountered Lakina and then Petitioner. S.A. 217. DEA officers also seized, as contraband, more than $10,000 in drug money, and a significant quantity of

marijuana.[3]

The CCSO is a nationally-certified law enforcement agency, and one of only two sheriff's offices in North Carolina certified by the Commission on the Accreditation of Law Enforcement Agencies. Respondent Earl Butler, Sheriff of Cumberland County ("Sheriff Butler"), had promulgated within the CCSO comprehensive use of force and professional standards (internal affairs) policies. S.A. 218-25. After Petitioner was shot, the CCSO's Professional Standards Division conducted a comprehensive investigation. S.A. 226. The SBI also conducted an independent but parallel investigation. The Cumberland County District Attorney requested that the District Attorney of adjoining Hoke County review the SBI's investigation report. Both the SBI and the Hoke County District Attorney determined that Captain Windham's use of force was reasonable and justified, and that he violated no criminal laws when he shot Petitioner. S.A. 1483. The CCSO's Professional Standards Division also found no violation of criminal law or CCSO policies or procedures.

As a result of the task force investigation and

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3 *See* Appx. to Mot. for Summ. Judgment at 4805.

search, Garry, Janet, and Lakina were charged with and pled guilty to federal drug trafficking offenses. S.A. 227-35, 236-43, 244-52. They are all incarcerated in federal prisons and will continue to be confined for many years.

SUMMARY OF ARGUMENT

Petitioner asks this Court to abandon the "objective reasonableness" analysis of Fourth Amendment excessive force claims mandated by *Graham,* by injecting an officer's subjective beliefs into a court's review. There is no compelling reason to do so and unsettle decades of consistent and effective precedent using the "objective reasonableness" test. Such a substantial and abrupt sea-change in Fourth Amendment excessive force jurisprudence would have major and undesirable consequences. Given that, at the summary judgment stage a court's review of the reasonableness of force "is a pure question of law," *Scott v. Harris*, 550 U.S. ___ , n.8, 127 S. Ct. 1769, 1776, n.8, 167 L. Ed. 2d 686 (2007), considering an officer's subjective beliefs would thrust judges into a quagmire of mind-reading, psychology, divination, and second-guessing. That, in turn, would be a poor and ultimately frustrating use of judicial resources.

THE COURT SHOULD DENY THE PETITION AND DECLINE TO REVIEW THE FOURTH CIRCUIT'S DECISION BELOW

There is No Compelling Reason to Grant Certiorari

Petitioner claims the Fourth Circuit "improperly interpreted" *Graham*, but then concedes its wisdom:

> [b]y eliminating the subjective intent of the officer as an element of the cause of action, the Court created conformity in that each officer would be held to the same standard of reasonableness and would be found responsible whenever this standard is violated regardless of the officer's state of mind.

Petition at 8.

Petitioner then, both confusingly and contradictorily, claims that making an officer's subjective reason for deciding to use deadly force would promote, not undercut, the conformity sought and achieved by *Graham*. Contrary to Petitioner's assertion, such an approach would instead throw the courts into a morass of subjective evaluations thrust upon them constantly and needlessly. There is no compelling reason in *Graham* jurisprudence to subject

courts to such a tortuous and tenuous process.

This case provides a textbook example of the dangers of adopting Petitioner's rationale. Petitioner claims that the Fourth Circuit "erroneously held that a police officer's use of deadly force can be deemed reasonable based on a risk that the officer never saw, appreciated, perceived or thought to be true." Petition at 2.

In this case, Captain Windham saw Petitioner coming at him as he was trying to control a non-compliant female.[4] S.A. 193-95. Captain Windham explicitly contradicts Petitioner's assertion that he never perceived a risk. When Captain Windham turned away from the female and stepped towards Petitioner to control him, he felt his weapon being jostled or grabbed. S.A. 199-200, 202, 204, 205-06. Petitioner's hand was within inches of the muzzle of Captain Windham's weapon. S.A. 204, 213, 252UU. Captain Windham testified, "*At that time is when I felt like the situation – I figured that I was fixing to – that*

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In serving a search warrant, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *L.A. County v. Rettele*, 550 U.S. ___, 127 S. Ct. 1989, 1993, 167 L. Ed. 2d 974, 979 (2007) (citing *Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 2594, 69 L. Ed. 2d 340 (1981)).

eminent [sic] danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two." S.A. 206 (emphasis added).

The Petition states that Captain Windham "testified that he never saw or thought that [Petitioner] was reaching towards him with arms outstretched." Petition at 2. This is untrue. In fact, when asked "Did [Petitioner] raise his arms like he was going to strike you at any point?", Windham responded, "He did raise his arms, but I don't recall how high. I do remember seeing his arms come up." S.A. 199.

Petitioner likewise claims that, according to Captain Windham, "[Petitioner] was walking towards him and was not running with his arms outstretched or acting aggressively in any manner." Petition at 4. Petitioner seriously distorts and twists Captain Windham's testimony. Captain Windham actually testified that Petitioner made a threatening movement towards him "[b]y coming towards me" but did not recall that Petitioner made any *other* threatening movement towards him. Captain Windham also stated that it did not appear that Petitioner was running but that Petitioner *did raise his arms*, "I do remember seeing his arms come up." S.A. 199.

Petitioner concedes this is a crucial point. The Petition acknowledges that the Fourth Circuit affirmed the district court's grant of summary judgment on the grounds that a reasonable officer might have believed that Petitioner, who claimed to be reaching towards a child to grab her, was reaching towards Captain Windham and thus posed a risk of serious harm. Petition at 2.

Petitioner himself testified that he was trying to catch the child, who was *running* by him. S.A. 252M-252N, 252P-252Q. Petitioner testified, "I remember . . . I were (sic) trying to **run** to grab her." S.A. 252N. When asked if "the first thing [Petitioner] did when he heard the flash bang was to run to get [the child]", Petitioner answered, "Yes." S.A. 252N. He testified the child was running from the living room to the back, *i.e.*, *running directly towards* and into the room that the officers were entering through the alternate breach. S.A. 252R. So despite his contrary protestations in his Petition,[5] Petitioner was both moving rapidly (in order to catch up with the running

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5 This Court has recently re-affirmed that, in the context of summary judgment, not all factual disputes – even material ones – are "genuine," when a bare assertion by a non-moving party is "so utterly discredited by the record that no reasonable jury could have believed him." *Scott v. Harris*, 550 U.S. ___ , 127 S. Ct. at 1776, 167 L. Ed. 2d at 694.

child) in the direction of Captain Windham and had his hands out and was reaching. A reasonable officer could have reasonably perceived, correctly or not, that Petitioner was reaching for the officer even if Petitioner was in fact reaching for the child.

Petitioner inaccurately tells this Court, without any citation to matters of record, that other officers in the raid confirmed that Petitioner did not grab Windham's gun and that the female did not jump on Captain Windham's back. Petition at 4. Actually, they simply testified in their depositions that they could not see the confrontation between either Lakina and Captain Windham or Petitioner and Captain Windham. They certainly did not "confirm" Petitioner's claims.

In sum, Petitioner either misstates or twists the record to try to create an impression that Captain Windham's subjective intent was other than it was. Should the Court accept Petitioner's rationale for granting review, this is what judges will confront on a regular basis. This is the trap that *Graham's* objective reasonableness analysis is intended to avoid. This is exactly why this case presents no compelling reason to grant certiorari.

The Fourth Circuit Correctly Applied this Court's Decision in *Graham*

As *Graham* teaches, a claim that a law enforcement officer used excessive force in a seizure is analyzed under the "objective reasonableness" standard of the Fourth Amendment. 490 U.S. at 388, 109 S. Ct. at 1867. A law enforcement officer's actions are not excessive if they are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Id.* at 397, 109 S. Ct. at 1871.

To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances. *Rowland v. Perry,* 41 F.3d 167, 172 (4th Cir. 1994). Subjective factors involving the officer's motives, intent or propensities are not relevant. *Id.*, at 173. The immunity inquiry, however, must be filtered through the lens of the officer's perceptions at the time of the incident in question. *Id.*

Under this analysis, the court's proper inquiry is whether the officer's actions in using force alleged to be excessive are objectively reasonable in light of the facts and circumstances confronting the officer, *without regard to his underlying intent or motivation.* The "reasonableness" of a particular use of force must

be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham,* 490 U.S. at 396, 109 S. Ct. at 1872; *Rowland,* 41 F.3d at 173.

The "objective reasonableness" standard limits second-guessing of the reasonableness of actions. This standard also limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what a reasonable officer would have perceived. The officer's subjective state of mind is not relevant, but his perceptions of the objective facts of the incident in question are. *Rowland* 41 F.3d at 173; *see also Schultz v. Braga,* 455 F.3d 470, 477 (4th Cir. 2006).

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving– about the amount of force that is necessary in a particular situation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. 490 U.S. at 396-97, 109 S. Ct. at 1872.

In *Graham*, this Court went so far as to reject the Court of Appeals' consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm" as incompatible with a proper Fourth Amendment analysis:

> We do not agree with the Court of Appeals' suggestion,. . ., that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor *puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.*

Id. at 397, 109 S. Ct. at 1872-73 (internal citation omitted) (emphasis added).

In this case, Captain Windham perceived that his gun was threatened, and that he faced an imminent threat of serious physical harm. The Fourth Circuit properly analyzed the threat facing Captain

Windham under *Graham* and its progeny. As the Fourth Circuit correctly observed, consistent with *Graham*,

> "[s]ubjective factors involving the officer's motives, intent, or propensities are not relevant." *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994). The court looks at the officer's actions "in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 388 (1989).

Slip op. at 10, n.9.

The Fourth Circuit noted that, "[a]lthough the immunity inquiry is objective, it 'must be filtered through the lens of the officer's perceptions at the time of the incident in question.' *Rowland*, 41 F.3d at 173. This allows the court to focus on what the officer 'reasonably perceived.'" Slip op. at 11.

The Fourth Circuit then properly applied *Graham*, by framing the test as

> whether a reasonable officer in Windham's position could have believed that his gun was threatened. The Court does not inquire whether Windham himself believed that his gun was

> threatened. Instead, the focus is on a hypothetical reasonable officer facing the same situation (reconstructed in [Petitioner's] favor) that Windham faced.

Slip op. at 12-13. Applying this test, the Fourth Circuit then concluded that a reasonable officer, forced to make a quick decision, could have reasonably concluded[6] that Petitioner posed an immediate threat of serious physical harm. *Id.* at 13-18.

Making an officer's subjective perceptions part of *Graham's* "objective reasonableness" inquiry would destroy the conformity and consistency sought by this Court's adoption of that standard and undo decades of precedent. It will cause courts at every level of the federal and state systems to second-guess law enforcement officers and to become, in effect, mind readers or diviners.

Petitioner's "horror story" that *Graham* might allow an officer to escape liability based on something he never saw, thought or believed to be true does not apply in this case. That hypothetical "horror story"

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6 "[A] mistaken understanding of the facts that is reasonable in the circumstances can render a seizure based on that understanding reasonable under the Fourth Amendment." *Milstead v. Kilber*, 243 F.3d 157, 165 (4th Cir. 2001).

does not reflect the facts of this case.

Captain Windham had suddenly confronted a chaotic, tense, and volatile situation. He had attempted to subdue a difficult subject in Lakina, who was either on his back, or very close behind him, or to his side. Petitioner was advancing towards him with hands outstretched. Unchallenged forensic evidence established that Petitioner's hand was inches from Captain Windham's weapon when he fired. Captain Windham clearly perceived and believed that his gun was at risk. He testified he felt it being jostled and fired in response to that risk. "At that time is when I felt like the situation – I figured that I was fixing to – that eminent [sic] danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two." S.A. 206

The Fourth Circuit's application of *Graham's* "objectively reasonable" standard to the foregoing undisputed facts was appropriate, correct, and unremarkable. The Fourth Circuit properly analyzed and applied this Court's decision in *Graham*. Certiorari is therefore unwarranted.

Other Circuit Court Decisions Cited by Petitioner Do Not Conflict with the Fourth Circuit's Decision

Citing an unpublished 2007 decision of the Sixth Circuit, a 1994 decision of the Ninth Circuit, the dissent in an unpublished 1992 decision of the Ninth Circuit, and dictum from a 2003 decision of the Eleventh Circuit,[7] Petitioner contends, unpersuasively, that those other Circuit Court decisions are in conflict with the Fourth Circuit's decision in the present case.

Petitioner cites the Sixth Circuit's unpublished decision in *Murray-Ruhl v. Passinault*, 246 Fed. Appx. 338 (6th Cir. 2007). In *Murray-Ruhl*, the majority opinion reversed summary judgment for an officer who continued to shoot at a fleeing vehicle after it passed him by, hitting and killing the driver because "this record creates a dispute of fact concerning whether events unfolded as defendants claim . . . and whether *their actions can be said to have been objectively reasonable under those circumstances.*" *Murray-Ruhl*, 246 Fed. Appx. at 344 (emphasis added). *But see,*

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7 *Murray-Ruhl v. Passinault*, 246 Fed. Appx. 338 (6th Cir. 2007) (unpublished); *Alexander v. San Francisco*, 29 F.3d 1355 (9th Cir. 1994); *Trahan v. City of Oakland*, 960 F.2d 152 (9th Cir. 1992) (unpublished); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003).

Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) Similarly, the majority was concerned that "the reasonable of use of deadly force turns entirely on which version of the facts one accepts . . . [T]he district court simply failed to acknowledge the conflicts in the parties' allegations of fact concerning the reasonableness of [the officer's shooting]." *Id.* at 344-45.

The majority opinion draws these conclusions by applying not only *Graham* and its "objectively reasonable" test, but also the standard of *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 2771 (1986), that qualified immunity should not be granted "if, on an objective basis, it is obvious that no reasonably competent officer would have [shot the victim]" but should be granted "if officers of reasonable competence could disagree on this issue." *Murray-Ruhl* 246 Fed. Appx. at 343. Within this framework, which is entirely consistent with the Fourth Circuit's analysis in the present case, the majority opinion held that a jury could conclude that the officer could not *reasonably* have believed that the driver posed a danger. *Id.* at 344-45, 346

Among the evidence offered by plaintiff was forensic evidence that not one of the twelve shots fired by the officer struck the front or windshield of the

plaintiff's decedent's vehicle, and that eleven of the twelve shots fired at plaintiff's decedent's vehicle were fired after the vehicle had passed by the officer and while plaintiff's decedent was driving away from the officer. Plaintiff also offered eyewitness testimony that the officer yelled only once at plaintiff's decedent's vehicle to stop and without waiting, fired; and the officer ran after the vehicle and fired at it from behind. Plaintiff also offered an autopsy report, which determined that Plaintiff's decedent was shot from behind. In addition, testimony from the shooting officer's partner that he was not in the vehicle's path and that he never felt in danger of being struck by the vehicle contradicted the shooting officer's contention that he fired in defense of his partner. *Id.* at 341.[8]

Based on the foregoing evidence, the court held, not surprisingly, that the case presented "a situation in which there *is* a question regarding whether the officer reasonably could have believed that anyone's life was endangered . . . [A] jury could find that no reasonably competent officer would have shot the victim[.]" *Id.* at 346. (Emphasis in original).

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8 The court also noted that the shooting officer called for an ambulance for himself and reported at the time of the incident and claimed for some days afterward that he had been hit by the plaintiff's decedent's vehicle, and that such report was a "complete fabrication". *Id.* at 340-41.

Petitioner's citation of *Murray-Ruhl* is more than merely in-passing strange because, in that case, the officer asserted he was *subjectively* in fear of serious injury. The Sixth Circuit, however, found disputed facts from which a jury could have concluded that a reasonable officer in that situation could not have *objectively* believed that anyone was in danger. Here, Petitioner asserts the opposite: that the Fourth Circuit's ruling that a reasonable officer in Captain Windham's situation could *objectively* have feared for his safety should be set aside because Petitioner contends, albeit incorrectly (see *supra* at 18-19, 27), that Windham did not *subjectively* perceive he was in danger. Petitioner is comparing "apples and oranges".

The appropriate comparison between "apples and apples" was made in *Murray-Ruhl* in Chief Judge Boggs' concurring opinion. He emphasized that "we look not to whether, in retrospect, [the driver] presented an *actual* danger, but whether, in the context of unfolding events, [the officer] could have *reasonably perceived* a danger." 246 Fed. Appx. at 348 (emphasis in original). The question of whether the officer in fact feared for his safety may have been disputed, but was "not material to the question of qualified immunity, which is concerned only with the objective reasonableness of the officer's actions, and not with his subjective state of mind." *Id.* at 349.

> [Plaintiff's] assertions that [the driver] did not in fact endanger the officers or anyone else, and that the [officer] did not in fact believe that he . . . was in danger, are not disputes material to the question of qualified immunity. If they were, any plaintiff in an excessive use of force claim could defeat summary judgment on qualified immunity grounds simply by asserting as a fact that the defendant did not have a requisite reasonable state of mind, or that the victim, in hindsight, did not in fact present a danger. On the contrary, the question of qualified immunity is a question of law that depends only on objective reasonableness, not on an actual danger or subjective state of mind.

Id., at 350.

Chief Judge Boggs accurately foresees that the new standard Petitioner urges would lead to abuse and manipulation. That is, itself, a sufficient reason to deny certiorari.

Petitioner cites *Alexander v. San Francisco*, 29 F.3d 1355 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083; 115 S. Ct. 735; 130 L. Ed. 2d 638 (1995), and *Trahan v. City of Oakland*, 960 F.2d 152,1992 U.S. App. LEXIS 8566 (9th Cir. 1992), an unpublished opinion

from the Ninth Circuit as being in conflict with the Fourth Circuit opinion below. They are not.

Alexander is readily distinguishable. The 1994 decision focuses largely on the Fourth Amendment's warrant requirement. 29 F.3d at 1360-63. Insofar as it also, almost in passing, addresses excessive force under the Fourth Amendment, it stands only for the established proposition that the amount of force used must be commensurate with the circumstances creating the need for the force. *Id.* at 1366-67.

In *Alexander*, the majority opinion, over a vigorous dissent, focused on the propriety of police entering a house pursuant to a forcible entry administrative search warrant obtained by the local health department to inspect a serious sewage violation. The occupant, characterized as a "mentally ill, elderly, half-blind recluse", had not responded to multiple efforts to conduct an inspection of his premises, and when police showed up to assist in serving the forcible entry administrative search warrant, called out, "I'm going to get my gun and use it." After cordoning off the area and deploying a hostage negotiating team, who failed to get any response from the occupant, the police tactical squad entered the house. The occupant appeared at the top of a staircase holding a .22 caliber handgun. When the

police ordered the occupant to drop the gun, he said, "I told you I was going to use it" and pulled the trigger. Officers shot back, and the occupant died from gunshot wounds shortly thereafter. *Id.* at1357-58.

Both the majority and the dissent in *Alexander* acknowledged and conceded that, all other things being equal, the officers were *allowed* to employ deadly force against the occupant once he had confronted them with a drawn handgun. *Id.* at 1366, n.12. The dispute between the judges was entirely over whether the purpose of the police in *entering* the house was to arrest the occupant rather than to assist in service of the administrative search warrant. In the view of the majority, if the purpose was to effect an arrest, then the administrative search warrant did not authorize that action and the police would have been required to obtain an arrest warrant. *Id.* at 1360, 1364.

If the police entered to effect an arrest, the *Alexander* majority held the occupant's Fourth Amendment *warrant* rights would have been violated. *Id.* at 1360. The majority held that this factual dispute precluded summary judgment on qualified immunity for the individual officers at that stage.

In *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the Ninth Circuit, commenting on *Alexander*,

stated:

> we held that if the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting the man – even though they reasonably shot him at the moment of shooting – because they used excessive force in creating the situation which caused [the man] to take the actions he did.

292 F.3d at 1188 (quoting *Alexander*, 29 F.3d at 1366) (internal quotation marks omitted); *but see Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (looking only to whether it was reasonable for police officer to shoot in the circumstances as they existed at that moment).

The *excessive force* Fourth Amendment claim, on the other hand, did not hinge on the officers' intent, but rather on the *reasonableness* of the force in making the entry: "The force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the consideration of the *Graham* factors." *Alexander*, 29 F.3d at 1367.

Just like the Fourth Circuit in the present case, the Ninth Circuit did not dispute that the officers were entitled to use deadly force once they were in the

residence and confronted with an individual who posed a threat to them of serious injury. "The excessive force claim turns on the force the officers used in entering the house, not on the force they used or didn't use once they had entered." *Id.* at 1366, n.12. The issue of force used in an entry, of course, is not relevant to the Fourth Circuit's decision in the present case.

The *Alexander* majority felt that a jury needed to determine the reasonableness of a SWAT team being deployed to *enter* the residence under the circumstances, not the level of force used once they were inside the residence. This Court has stated, however, that at the summary judgment stage, once a court has determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of an officer's actions "is a pure question of law." *Scott v. Harris*, 550 U.S. ___ n.8, 127 S. Ct. 1769, 1776, n.8, 167 L. Ed. 2d 686, 694 n. 8 (2007).

Alexander has occasionally been cited for the well-settled proposition that, in excessive force Fourth Amendment claims, the force applied must be balanced against the need for that force.[9] *See*,

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9 *Vlasak v. Las Vegas Metro. Police Dep't*, 213 Fed. Appx. 512, 514 (9th Cir. 2006); *Gahn v. Fujino*, 1994 U.S.

Graham, 490 U.S. at 396, 109 S. Ct. at 1872. Research has disclosed no case citing *Alexander* for the proposition that an officer's subjective intent is relevant in analyzing an excessive force claim under *Graham's* "objective reasonableness" standard.

Trahan is inapposite. In *Trahan*, the majority held, and the dissent conceded, consistent with *Graham*, that "intent is not an element of [a] Fourth Amendment claim." 1992 U.S. App. LEXIS 8566 at *6. The dissent concedes this point, correctly observing that, "*Graham* teaches that a Fourth Amendment excessive force claim arising out of an arrest must be evaluated under an objective reasonableness standard . . . without regard to the officer's intent or motive " *Id.* at *13-*14. Thus, *Trahan* is consistent, not in conflict, with the Fourth Circuit's decision in the present case.[10]

App. LEXIS 30018 at *8 (9th Cir. 1994); *Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1261, 1262-63 (E.D. Wash. 2005); *Eason v. Anoka-Hennepin E. Metro Narcotics & Violent Crimes Task Force*, 2002 U.S. Dist. LEXIS 10645 at *12 (D. Minn. 2002).

10 The following passage from the dissent in *Trahan* does not suggest a conflict among circuits that would justify certiorari:

> Even though subjective motivation is immaterial, *Graham* notes that "evidence

Petitioner also cites dictum from *Carr v. Tatengelo*, 338 F.3d 1259 (11th Cir. 2003), that the reasonable inquiry should include the "reasonable apprehension" of officers in determining if force was excessive. Citation of dictum does not establish a conflict in precedent between circuits that would justify certiorari.

A close reading of *Carr*, however, makes clear that in this decision the Eleventh Circuit *agrees* completely with the Fourth Circuit. The excerpt cited by Petitioner is a footnote to a passage cited from *Graham* itself. That passage sets forth the familiar learning that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

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> that the officer harbored ill-will" might properly be considered by the factfinder "in assessing the credibility of an officer's account." *Graham*, 490 U.S. at 399 n.12. This dictum means that even though intent is not an element of excessive force, evidence of intent may be relevant to whether objectively excessive force was used.
>
> 1992 U.S. App. LEXIS 8566 at *14-*15.

First, this passage is from the dissent, not, the majority opinion. Second, it refers to dictum. Third, it is not inconsistent with the Fourth Circuit's decision in this case, in that as noted, the majority and dissent both embrace the objective standard of *Graham*.

20/20 vision of hindsight." 338 F.3d at 1267-68. In this context, it is clear that the Eleventh Circuit footnote refers to the "reasonable apprehension" in a rapidly evolving situation of *a reasonable officer on the scene*. And the holding of Carr was that the officers in that case reasonably, *i.e.*, *objectively reasonably*, perceived that someone was pointing a gun and chambering a bullet at officer Tatangelo. In this case there is no conflict between the circuits; there is considerable congruence.

In sum, the cases relied upon by Petitioner do not demonstrate any conflict between the Fourth and any of the Ninth, Sixth or Eleventh Circuits, as Petitioner contends, and therefore do not support Petitioner's argument that certiorari should be granted.

CONCLUSION

This Court would do a disservice to decades of consistent *Graham v. Connor* jurisprudence were it to grant certiorari to review the Fourth Circuit's decision below. To do so would plunge judges into the slippery and evanescent task of evaluating, and judging, officers' intent and motivation. There is no compelling reason to do so. In any event, the Fourth Circuit appropriately applied *Graham* in an unremarkable manner that was fully justified by the record below. Finally, there is no conflict between the circuits on whether an officer's subjective intent should be

considered in applying the objectively reasonable test of *Graham* in excessive force claims.

WHEREFORE, Respondents respectfully pray that the petition for writ of certiorari be denied.

This the 21st day of April, 2008

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